

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 82 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

MAHABOOBALIKHAN M MUNSHI

Versus

JOHRABIBI WD/O FAJALAZIM F PATHAN

Appearance:

MR ASHWIN H ACHARYA for Petitioners
MR AJ MEMON for Respondent No. 1
MR JA ADESHRA for Respondent No. 4, 5, 6

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 06/07/2000

ORAL JUDGEMENT

This is a Civil Revision Application under
Section 29(2) of the Bombay Rents, Hotel and Lodging
House Rates (Control) Act, 1947 (hereinafter to be
referred to as the Bombay Rent Act) filed by the

defendants out of which as per the case of the plaintiff defendant no.1 is a tenant and defendant no.2 is sub-tenant of defendant no.1 challenging the correctness, legality and propriety of the judgement exh.33 dated 15.1.1987 rendered by the learned Extra Asst. Judge, Mehsana, in Regular Civil Appeal No.287 of 1982 whereby he was pleased to dismiss the appeal preferred by the defendants and confirm the judgement exh.70 dated 24.9.1982 rendered by the Joint Civil Judge (JD) at Patan in Regular Civil Suit No.193 of 1978 which was filed by the plaintiff-landlord.

2 Here in this Civil Revision Application petitioner no.1 is defendant/tenant while defendant no.2 whose heirs and representatives are brought on record in this Civil Revision Application No.82 of 1987 was a subtenant as per the plaintiff's case. The present revision opponents are the heirs and legal representatives of original plaintiff - Pathan Faizali Azim Fazal Karim who died on 24.4.1989 during the pendency of this revision. For the sake of convenience the parties will be referred to as the plaintiffs and defendants.

3 The facts leading to this present Civil Revision Application in a nutshell are as follows:-

4 The original-plaintiff who filed the suit was a owner of house situated in Raktavado, Patan, and that house was bearing Tika No.29/4, S.No.115. That house was let to defendant no.1 at monthly rent of Rs.30/with condition that all the taxes are to be paid by defendant no.1. From the very beginning the plaintiff has come with a case that on 26.11.1973 the defendant had no.1 got an agreement executed from the plaintiff and that agreement to sell the suit property was executed in favour of defendant no.1 with a term that suit house to be sold for Rs.5,999/=. As against that consideration, Rs.3,200/- were paid in cash to the plaintiff as an earnest money and the rest of the amount was to be paid within one year. It was also agreed by both the parties in that agreement that the rent of the suit house was to be paid at the rate of Rs.15/= per month instead of Rs.30/=. It is the case of the plaintiff that defendant no.1 has become tenant-in-arrears for rent for more than six months and that he is negligent to make the payment of the said amount which had become due within one month after the date of receipt of the notice. As per the case of the plaintiff - defendant no.1 has paid rent for the period up to 31.12.1974 at the rate of Rs.30 per month. He has come with a specific case that defendant no.1 has

not paid rent for the period from 1.1.1975 to 30.4.1978 i.e. for 40 months and as such an amount of Rs.1200/- being arrears of rent has become due from defendant no.1 to the plaintiff.

5 It is also the case of the plaintiff that defendant no.1 has vacated the suit house and he has sublet the suit house to defendant no.2. Therefore, plaintiff by addressing a suit notice dated 6.5.1978 to both the defendants terminated the tenancy of defendant no.1 and called upon both the defendants to hand over the possession of the suit premises to the plaintiff. That notice was refused by defendant no.1 but it was received by defendant no.2 on or about 9th June 1978. It is the case of the plaintiff that none of the defendants has replied that said notice nor have they handed over the possession of the suit premises to the plaintiff. Therefore, on or about 6.10.1978 the plaintiff filed the suit against both the defendants for a decree of eviction of suit premises and to recover an amount of Rs.1,115/- from the defendants.

6. In that suit, both the defendants appeared and contested the suit by filing a joint written statement exh.12 wherein they have denied practically all the pleadings of the plaintiff pleaded in the plaint. As per the written statement, defendant no.1 has advanced his case that in view of the agreement to sell, executed by the plaintiff, he performed part of agreement which was to be performed by him and therefore his possession of the property may be protected in view of Section 53-A of the Transfer of Property Act, 1882. In written statement he has explained the circumstances as to why he did not get the final sale deed executed from the plaintiff. It is the case of the defendant no.1 that the plaintiff was involved in one criminal case and was arrested and put in judicial custody and therefore he could not get the final sale deed executed. He has also advanced his case that he has paid practically all the amounts of consideration for suit property except Rs.500/-. Defendant no.1 has come with a specific case that he had remitted Rs.500/- by cheque dated 11.2.1974 and Rs.180/- towards rent were set off and on 16.12.1974 as per the case of the defendant no.1 - plaintiff had acknowledged the receipt of Rs.5,500/- and only Rs.500/- did remain unpaid. In short, defendant no.1 has advanced his case that his possession in the suit premises be protected under Section 53-A of the Transfer of Property Act.

7 From the pleadings of both the parties necessary issues were framed by the learned Judge of the trial

Court at exh.14. Both the parties led their oral as well as the documentary evidence in support of their respective cases. After hearing the arguments of the learned advocates for both the parties and after analysing and appreciating the evidence led by both the parties, the learned Judge of the trial Court negatived the defence of defendant no.1 and he accepted the case of the plaintiff that defendant no.1 has become a tenant-in-arrears of rent for more than six months i.e. case falling under Section 12 (3)(a) of the Bombay Rent Act and defendant no.1 has sub-let the premises of the suit to defendant no.2 i.e. case falling u/s 13(1)(e) of the Bombay Rent Act. The learned Judge of the trial Court then rendered a judgement Exh.70 on 24.9.1982 whereby plaintiff's suit was allowed and he passed a decree for eviction of the suit premises in favour of the plaintiff. He also passed a money decree directing defendant no.1 to pay Rs.1115/- being arrears of rent, etc. The plaintiff was also made entitled to recover mesne profits at the rate of Rs.30/- per month for the period from the date of the suit to date of satisfaction of decree.

8 Being aggrieved against and dissatisfied with the said judgement exh.70 of the learned Judge of the trial Court the original defendants preferred Regular Civil Appeal No.287 of 1982 in the District Court at Mehsana. In that appeal the learned Extra Asst. Judge, Mehsana, after hearing the arguments of the learned advocates for both the parties and on perusal of the record and proceedings of the case and after re-appreciating the evidence of both the parties by his judgement Exh.33 dated 15.1.1987 came to the conclusion that the plaintiffs' case is proved and therefore appeal preferred by defendants was dismissed meaning thereby the judgement of the trial Court was confirmed.

9 Being aggrieved against and dissatisfied with the said judgement the original defendants have preferred this present Civil Revision Application No.82 of 1987 challenging the correctness, legality and propriety of the judgement of the appellate Court. As per the case of the plaintiff, during the pendency of the Civil Revision Application petitioner no.2 (sub-tenant) has died and therefore his heirs and legal representatives are brought on record. During the pendency of the revision application original opponent died and therefore his heirs and legal representatives are brought on record.

10 Heard Shri R.V. Desai, the learned advocate for the revision-petitioners, and Shri J.A.Adeshra, the

learned advocate for the revision-opponents nos.4 to 6. Mr A.J. Memon has not appeared during the course of the arguments. I have gone through the judgement challenged in this revision petition. The learned advocates have furnished certified true copy of the agreement to sell on which the defendant no.1 has advanced his defence.

11 Before considering the contentions of the rival parties, it is necessary to place on record the scope and ambit of revision application u/s 29(2) of the Bombay Rent Act. As held in the case of PATEL VALMIK HIMATLAL & ORS. V. PATEL MOHANLAL MULJIBHAI reported in (1998) 7 SCC 383, the powers u/s 29(2) of the Bombay Rent Act are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to rehear the matter and reappreciate the evidence. The mere fact that a different view is possible on reappreciation of the evidence cannot be a ground for exercise of the revisional jurisdiction and High Court cannot substitute its own findings on a question of fact for the findings recorded by the courts below on reappraisal of evidence.

12 Keeping in mind the above legal position, the contentions of rival parties are dealt with herein below:-

13 Shri R.V. Desai, the learned advocate for the revision-petitioners, has vehemently argued that during the continuance of the tenancy the plaintiff-landlord had executed an agreement to sell dated 26.11.1973 and as against that agreement to sell, the defendant no.1 had paid Rs.3,200/- in cash and Rs.2,799/- was remained to be paid by the defendant no.1 within one year. Shri Desai has further contended that in view of Section 53A of the Transfer of Property Act, defendant no.1 had become an owner of the suit property and therefore his possession in suit-premises should be protected. Admittedly, that agreement to sell is not in dispute by both the parties. The agreement to sell was executed on 26th November 1973. As per this agreement to sell Exh.30 the plaintiff had made it clear in the said agreement that possession of the defendant no.1 was that of tenant and that defendant no.1 would become an owner after one year on execution of the final sale deed. In reply to the arguments of Shri Desai, Shri Adeshra, learned advocate for the revision-opponents nos.4 to 6, has placed reliance on the decision of RADHAKISAN LAXMINARAYAN TOSHNIWAL Vs. SHRIDHAR RAMCHANDRA ALSHI AND OTHERS. reported in AIR

1960 SC 1368 wherein it has been held that under Sec. 54 of the Transfer of Property Act a contract for sale does not of itself create any interest in or charge on immoveable property and consequently the contract in the instant case created no interest in favour of the vendee and the proprietary title did not validly pass from the vendors to the vendee and until that was completed no right to enforce pre-emption arose. In that case question of pre-emption was agitated. Here in this case plaintiff wants to obtain possession of the property under the Bombay Rent Act. When the defendant no.1 has relied on agreement to sell, it is required to take into consideration the contents of the agreement to sell. By that agreement Exh.30 defendant no.1 had accepted the one year's term that his possession would be that of tenant. By that agreement the contractual rate of rent which was @ Rs.30 was reduced to Rs.15/= and defendant no.1 had agreed to pay the rent at the rate of Rs.15/= per month meaning thereby he has accepted that he was a tenant and he agreed to pay the rent at the rate of Rs.15 per month till the final sale deed is executed. The period for getting the final sale deed executed was fixed for one year. Defendant no.1 did not get the final sale deed executed from the plaintiff. He has advanced his case for non-availability of the plaintiff for getting the sale deed executed. He could have filed a suit for specific performance of the agreement to sell. Till the suit was filed he did not take any step on the basis of that agreement to sell and when the plaintiff filed the suit to recover the possession of the premises, he advanced a defence that his possession should be protected under Section 53A of the Transfer of Property Act. Shri Adeshra has also cited one authority in the case of RANGARAO RAMARAO DESHPANDE V. CHANNAPPA BASAPPA LAKAMANAHALLI reported in AIR 1975 KARNATAKA 155 wherein it is held that owner's executing registered agreement to sell land to the tenant does not create any interest in the property and hence regarding tenancy and ownership there is no merger of interest under S.111 (d). It was also held that where tenant's rights under such an agreement were sold by the Court in execution of a money-decree against the tenant, he was entitled for a declaration that the prior court-sale did not affect his tenancy right.

14 Shri Adeshra has also cited one another authority of BHAGWANDAS PARSADILAL V. SURAJMAL AND ANOTHER reported in AIR 1961 MP 237. In that case the defendant was tenant in possession of a part of house and he was continued to remain in possession of the same in his capacity as a tenant even though a contract to sell the

houses was executed by the owner in his favour. The defendant brought a suit for specific performance of the agreement against the owner and the plaintiff, a subsequent purchaser, under a registered sale deed with knowledge of the prior agreement to sell. During the pendency of the suit, the plaintiff brought a suit for ejectment of the defendant from the suit premises after serving a notice to quit. In that case it was held that as the defendant had been in possession throughout in his capacity as a tenant and not in part performance of the contract, he could not be heard to say that by reason of the agreement to sell his possession was no longer that of a tenant. Here in this case the facts are very much similar to that of the aforesaid cited case.

15 If really defendant no.1 wanted to get the final sale deed executed in his favour he would have taken some steps against the plaintiff. Moreover, in his deposition defendant no.1 has admitted that he vacated the suit premises and he has handed over the possession to defendant no.2 in the year 1977. This fact is not challenged by the defendant No.2 and therefore defendant no.1 cannot agitate the point u/s 53A of the Transfer of Property Act because his possession in the suit premises continued in his capacity as a tenant and when he failed to pay the rent as agreed upon in the agreement to sell, he had become a tenant-in-arrears of rent for more than six months. It is also not the case of the defendant no.1 that he was ready and willing to pay the rent. He has not advanced the case for protection of the suit premises u/s 12(2) of the Act. Shri Desai has further argued that as the plaintiff has failed to take any step against defendant no.1 for four years, it should legitimately be inferred that there was an understanding between the plaintiff and defendant no.1 and that is why the defendant did not raise any dispute within the period of four years. This type of contention is not acceptable. Had he taken any such type of plea in the written statement, the plaintiff could have led the evidence on that score. Such type of contention is also not taken in the appeal also. Such type of contention which is taken for the first time in this Civil Revision Application after a long period of 23 years cannot be accepted for want of plea in the written statement.

16 Shri Desai has put much reliance on this agreement to sell Exh.30 and has argued that the learned Appellate Judge has not appreciated evidence keeping in mind exh.30, in its true and correct prospective and therefore as per his arguments the finding arrived at by the learned Appellate Judge is perverse. Shri Adesra has

argued that the learned Appellate Judge has considered all the aspects of this agreement to sell exh.30 in his judgement. He has analysed and appreciated all the evidence on record and thereafter he has come to the conclusion that defendant no.1 is not entitled to any protection u/s 53-A of the Transfer of Property Act. Merely because the finding is not convenient to either party, it cannot be said that it is a perverse finding. The learned Appellate Judge has arrived at the conclusions keeping in mind the well settled legal position with regard to Sec. 53-A of the T.P. Act as well as the provisions of Section 12(3)(a) of the Act and therefore when this Court finds that the learned Appellate Judge has given cogent and convincing reasons for arriving at a particular possible decision, then this Court cannot interfere with the decision arrived at by the learned Appellate Judge. As stated earlier, this Court cannot rehear the matter again in this revision application and this Court cannot also reappreciate the evidence to come to a different conclusion and therefore the contention taken with regard to Section 53(A) of the T.P. Act is devoid of merits.

17 So far as the case of the plaintiff for subletting is concerned both the Courts below have given consistent and concurrent findings. During the course of the arguments, Shri Desai has not agitated any point with regard to subletting and therefore the findings arrived at by both the Courts below on the point of subletting is not challenged in the Civil Revision Application and on that score also the plaintiff is entitled to possession of the suit premises.

18 Except aforesaid contentions, no other contention has been taken. In view of the discussion made hereinabove, this revision application deserves to be dismissed and accordingly it is dismissed with no order as to costs. Rule is discharged. Interim relief granted earlier is vacated.

19 Shri R.V. Desai, learned advocate for the revision-petitioners seeks some time to enable them to secure alternative accommodation. Shri Adeshra is heard on this point. Admittedly, possession of the suit premises is with defendant no.2. He has no legal status to remain in the suit premises because it is proved that he is sub-tenant of defendant no.1 and therefore prayer for granting time is refused.

(mohd)